FILED

Supreme Court of the United States

OCTOBER TERM, 1960

No. 929

CHRISTOPHER MORGAN,

Petitioner,

against

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONDENT'S BRIEF ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of Facts as Developed in the Courts Below.

(Supplementing Petitioner's Statement)

1.

The Evidence Presented as to the Claim of Unseaworthiness.

In plaintiff's opening to the jury it appears that his claim of unseaworthiness of the tug and barge was, in principal part, based on the asserted absence of a "life line" on the barge (2b).* On the stand plaintiff himself admitted this played no part in the

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* "b" references to pages in Appellee's Appendix in the Court of Appeals; "a" references to pages in Appellant's Appendix in the Court of Appeals.

accident; when the contact threw him from the barge he was actually holding on to a cable or "life line" (6, 7b).

No witness testified Tug 20 was inadequate for the purpose of shifting barges or attributed the accident to any defect in the Tug. Plaintiff's expert specifically stated the tug could be used to shift barges (9b). The Court, in the charge which was not excepted to, summarized the evidence:

> "Other than the fact that it was older and it was shorter and less powerful than the regular tugs, (445) there was no testimony, as I recall it, that in any way associated the efficacy of the tug with the accident." (109a)

2.

Plaintiff's Position on the Motion for Limitation.

Plaintiff, at the close of the evidence, moved to take the case from the jury except for assessment of damages (103a). That motion was denied and the Court asked for agreement on dates relevant to the limitation issue. These were forthcoming (104a). The formal motion for limitation being then made, the Court asked for agreement that he might reserve on "that legal question" until after verdict, if any (105a).

> "Mr. Baker: I would submit to your Honor that under the question of the answer being filed setting forth that they have a right to limitation of liability, that the legal question should be reserved by the Court, but I submit to your Honor that the factual question as to whether or not

there was privity knowledge [sic] should or can be submitted to the jury for determination, and then the Court, after the decision of the jury, depending upon what the verdict is, takes up for consideration the legal (418) questions involved." (105a)

The Court obtained a concession on the factual point (106a) restated that he reserved the questions and proceeded to charge the jury without any objection or exception (113a).

3.

The Issues Submitted to the Jury.

The Court commented:

"It is the plaintiff's claim that his injuries were sustained as a result of the manner in which the tug and barge came together during a shifting operation in the waters of the Hudson River alongside of Pier 4 in Weehawken. It is his claim that the defendant was negligent because the force of contact between these two boats were so great that he was caused to be thrown from the barge into the river." (107a)

Plaintiff's expert's testimony that the "center cleat" rather than "off the corner" type of maneuver would make for less contact between barge and tug was referred to, as was both plaintiff's and his expert's testimony that they had on many occasions used both methods and defendant's witnesses' testimony that they knew both methods (108a). The jury was told that the latest or safest method was not required

(110a). The conflict in testimony as to whether the contact between tug and barge was or was not heavy was referred to (108a-109a).

Then the question:

"Of course, you know the defendant is not an insurer of plaintiff's safety. On the other hand, those people who employ seamen, ship owners, railroads, are required to fulfill a much higher degree of care than shoreside employers. One of the obligations that a ship owner has is that he provide a safe place for the seamen to work. Therefore, your ultimate question on the issue of defendant's negligence is did the defendant and its employees under the circumstances and at the time here disclosed fail to act as reasonable men or a reasonable ship owner would have acted in connection with the shifting of this barge." (110a)

4.

The Court's Basis of Decision on Limitation.

"The accident which caused plaintiff to be thrown into the water and injured was not the 'off the corner' movement but rather the negligent manner in which it was performed and which caused the tug and the barge to come together too violently. In short, the proximate cause of the accident was not the customary maneuver but the negligent manner in which the two vessels came together and this was nothing more than a mistake in navigational judgment on the part of the captain and for which the owners cannot be held to have knowledge or privity." (117a)

ARGUMENT

POINT I

Limitation as a defense was timely pleaded.
(Answering Petitioner's Point IV)

1.

The only two Courts of Appeal, the Second and Third Circuits, that were squarely presented with the issue prior to this case both held that, where there is but a single claimant, limitation of liability may be pleaded as a defense in the sole action and that the six months period during which petitions for limitation of liability may be filed against all claimants and injunctive relief secured thereon has no application. *Deep Sea Tankers* v. *The Long Branch*, 258 F.2d 757; 2 Cir. 1958, cert. den. 358 U.S. 933 following *The Chickie* 141 F.2d 80; 3 Cir. 1944.

2.

Any other holding would be in the teeth of the teaching of this Court culminating in *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147 as to the disparate nature of the substantive and procedural sections of the limitation statute and the history of statute and construction.

In *Lake Tankers* (354 U.S. at 150), for the majority, Mr. Justice Clark held that the purpose of the statutory scheme was to afford protection from disasters

and that procedure should be adapted to that goal. He said (354 U.S. 150, 151):

> "The first section of the Act here involved contains its fundamental provision which declares that the liability for any damage arising from a disaster at sea which is occasioned without the privity or knowledge of the shipowner shall in no case exceed the value of the vessel at fault together with her pending freight, 46 U. S. C. §183. As Mr. Justice Van Devanter stated for a unanimous Court in *White* v. *Island Transportation Co.*, 233 U. S. 346, 351 (1914), 'The succeeding sections are in the nature of an appendix and relate to the proceedings by which the first is to be made effective. Therefore, they should be so construed as to bring them into correspondence with it.' Among these sections dealing with the mechanics of effecting such limitation of liability is §184 covering those incidents where 'the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of [the claimants].' In that event, the section continued, 'they shall receive compensation from the owner of the vessel in proportion to their respective losses; and *for that purpose*' the owners 'may take the appropriate proceedings in any court * * *'. (Emphasis added)"

In *Deep Sea Tankers* (258 F.2d at 772-773), Medina C.J. set forth the history:

> "The first statute authorizing the limitation of liability, the forerunner of Section 183, was enacted in 1851, 9 Stat. 635. In 1872 the Supreme Court promulgated admiralty rules of procedure which permitted a shipowner to petition for limita-

tion of liability. Shortly thereafter the Congress enacted the substance of these rules into law. In commenting on the purpose of the rules, the Supreme Court said they 'were adopted for the purpose of formulating a proceeding that would give full protection to the shipowners in * * * a case' where there were 'various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo.' 'They were not intended to prevent them from availing themselves of any other remedy of process which the law itself might entitle them to adopt. They were not intended to prevent a defence by way of answer to a libel, or plea to an action, if the shipowners should deem such a mode of pleading adequate to their protection.' The Scotland, 105 U. S. 24, 33-34, 26 L. Ed. 1001. It is unnecessary to comment on the variety of situations that may arise, in some of which concursus is highly desirable if not indispensable and in others not.

In practice it developed that the proceeding by way of petition for limitation of liability was often a source of delay and circuity of action, because shipowners did not institute this independent proceeding until after the question of liability had been litigated and determined against them. To alleviate the abuses inherent in this situation, the Congress, on June 5, 1936, amended Section 185 to require that a petition for limitation must be filed within six months of notice of claim.

Section 185, as amended, does not refer to Section 183(a), and no reason has been advanced by appellants for making the right to limitation as provided in Section 183(a) subject to the six months time bar. Indeed, the Congress amended both Section 183(a) and Section 185 simultan-

eously in 1936 without specifying any time limit in Section 183(a). Moreover, the abuses which resulted under Section 185 prior to its amendment are not encountered when limitation is pleaded by way of answer, because the libelant, by filing its libel, controls the time within which the remedy must be invoked. Therefore, in accord with The Chickie, supra, we hold that the Metropolitan plea of limitation in its answer was not barred by the six months time limit of 46 U. S. C. A. §185."

3.

The two *Green* and the other cases cited by petitioner at page 31, top, besides having their holding misstated (infra p. 9), have no bearing in this action. There is here no question of the respective powers of state and federal court. The only question here is of procedure in a United States Court, the traditional repository of the power of limitation of liability in admiralty, to deal with a single claim there asserted.

The Chickie and *Deep Sea Tankers* are not distinguishable as brought in admiralty. The Court below said (Pet. 4a):

> "If limitation may be pleaded as a defense beyond the six month period, it would be unreasonable to make its availability turn on whether a plaintiff elects to bring suit on the admiralty side or the civil side of the court."

Further, it was correctly held (Pet. 4a) that plaintiff did invoke the remedy of maintenance and therefore admiralty jurisdiction. Maintenance and cure even if sometimes tried on the civil side, is a remedy whose derivation is almost immemorially in the law of

the sea. *Mitchell* v. *Trawler Racer*, 362 U.S. 539, 543, 544, note 6, *Garret* v. *McCormack Co.*, 317 U.S. 239, 240, note 2.

Application of the substantive law of limitation of liability is not restricted to admiralty courts or even United States courts. In a single claim such as this, it may be applied by even a state court, as petitioner overlooks in his statement of *Langnes* v. *Green*, 282 U.S. 531, at 540.

4.

The rule to be followed should not be based on considerations of civil side versus admiralty side, but on sound principles of judicial administration. It was held below:

> "There is sound reason to differentiate between an original petition for limitation and a plea setting up §183(a) of the statute in defense to a civil suit, since the plaintiff controls the date of bringing his suit. In the case at bar the complaint was filed on February 5, 1957, but was not served until February 8. The defendant's answer was served on February 26. The rule for which appellant contends disregards the desirability of one trial only, where all rights can be fairly decided in a single legal proceeding. See *Moore-McCormack Lines* v. *McMahan*, 2 Cir., 235 F. 2d 142, at 143; *British Transport Comm.* v. *U. S.*, 354 U. S. 129 at 133. Thus, in the case at bar, under appellant's rule, the Railroad could not safely wait to see whether the plaintiff would actually bring an action on the claim of which he had given notice, and there would be two suits pending in the District Court, in each of which the facts to be proved as to the accident producing plaintiff's injuries would be the same." (Pet. 4a)

POINT II

There was no question for the jury on the unseaworthiness count.

(Answering Petitioner's Point II)

Plaintiff chose to try his case with heavy reliance on expert testimony (32a-54a). There was no word, however, from plaintiff, his expert or the rest of the experienced crew of Tug 20 pointing out any connection between the age or sluggishness of the tug and the accident. The Court pointed this out in the charge without objection or exception (supra p. 2).

> "Unseaworthiness in the abstract does not afford a cause of action. An injury must be in consequence of the unseaworthiness—"must be connected with and result from it."
>
> *Mahnich* v. *Southern Steamship Company*, 321 U.S. 96, at 109.

Recently this Court said:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 99 L ed 354 75 S. Ct 382." *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 at 550.

Sufficiency of the evidence to go to the jury alone, particularly when the decision of the trial court may well be based on the complete failure to make the proof outlined in the opening, is not a question of which this Court should take jurisdiction.

POINT III

There was no error in submission of issues to the jury.

(Answering Petitioner's Point V)

1.

Petitioner does not state what evidentiary facts constitute the "factual issue of privity and knowledge" he claims was for the jury. As presented in the trial court any issue so denominated is for neither court nor jury, but a matter of concession without effect on the final result.

There was a full presentation of evidence by both sides at the trial. The time came for decision of the issues. The Trial Judge indicated he would take a jury verdict as to negligence. Defendant moved for limitation of liability. The Trial Judge stated that issue was for him and would be reserved. Plaintiff's failure to object to this exercise of admiralty jurisdiction at this point is spread upon the record. A single request was made—to give the jury the question of "privity (and) knowledge." The Court was not too sure what this meant (105a-106a), but stated that so far as the fact of defendant's consent to use of the "off the corner" movement was concerned that fact

was conceded. There discussion ended. The charge to the jury submitted no issue on which decision of the limitation question could be based. Exceptions were invited. There were none.

The Court therefore had ample reason for stating in his opinion after trial (115a) that his reserving decision on the defendant's motion for limitation of liability as well as the plaintiff's claim for maintenance and cure was "By agreement of counsel * * *".

Having consented to the procedure adopted, leaving decision as to limitation in the Court's hands, not having objected seasonably or, indeed, at all, plaintiff may not now complain that the Court did decide the motion.

2.

Plaintiff has no right by jury to trial of any issue on the applicability of a rule such as limitation of liability traditionally existing only in admiralty. When Congress desires to create a right to jury trial in maritime causes it does so (46 U.S.C. 688, 28 U.S.C. 1873) and extension should be left for legislative action.

3.

Questions of waiver at trial and withdrawals of issues by counsel are procedural minutiae with which this Court should not concern itself.

POINT IV

The jury decided and could have decided no question relevant to decision on limitation of liability. The Trial Court properly held that only the manner of execution of a customary maneuver was the cause of the accident.

(Answering Plaintiff's Point I)

1.

It is not now open to plaintiff to argue that the jury verdict decided anything on any issue bearing on whether a proper method of navigation was not used to the knowledge of defendant and that limitation of liability is accordingly not available to defendant. The charge was stated to be limited to "Jones Act negligence and the question of apportionment of negligence" (106a). Plaintiff failed to except (113a) if he had not already specifically consented to the reservation of the limitation question by the Trial Court.

2.

If the question of whether the use of the "off the corner" method as negligence was directed to limitation of liability, rather than constituting merely one facet of Jones Act negligence, summed up in the obligation to provide a safe place to work (supra pp. 3, 4), there is no way of telling whether the jury decided this question adversely to defendant. Where two theories are submitted to a jury, a general verdict

does not show upon which ground the jury found. Indeed, where one theory is not supported by the evidence, the verdict cannot stand. *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60, 78-79 (1907); *Christian* v. *Boston & Maine R.R.*, (2d Cir. 1940), 109 F. 2d 103; *Erie R.R.* v. *Gallagher* (2d C.A.), 255 Fed. 814, 817; *Lehigh Valley* v. *Normile* (2d C.A.), 254 Fed. 680, 682.

In *Christian*, 109 F. 2d at 105, the Court below said:

> "The error requires reversal of the judgment. The verdict for the plaintiff was a general one. For all we know, the jury found its verdict on the claim for which there was no evidence. Where two issues of negligence are sent to the jury and the verdict for the plaintiff is general, the judgment must be reversed if there was no evidence in support of one of the issues."

Previously, in *Gallagher*, 255 F. 2d, at 817, the same Court reversed a judgment for the same reason, saying:

> "The reason is that the appellate court cannot know but that the jury may have found its verdict upon the baseless charge."

The Court below saw no inconsistency between the jury verdict and the Court's ruling that the method of navigation had no causal relation to the injury. (Pet. 5a).

3.

The Trial Court Was Not Plainly Wrong in Holding That Only the Manner of Execution of the Maneuver Was the Cause of the Accident.

The barge had to be towed out of the slip. There is testimony that one possible method of doing so involved less likelihood of contact between barge and tug than the other. The method adopted, however, is one customarily used. No one testified that this method was inherently dangerous or likely to cause hard contact in an undue proportion of instances. Only a single instance of injury caused thereby was referred to and that when performed by plaintiff's expert (50a) who recognized that how hard the contact would be depended on how the tug was handled during the maneuver (49a).

The proof comes down to this, at best—tugs strike barges in the off the corner maneuver, but how hard is dependent on how the tug is handled. The variations in the maneuver and not the maneuver itself are responsible for a hard contact and consequent injury. The occasional use of the maneuver was with the privity and knowledge of the owner, the manner in which it was executed was entrusted to the judgment of a concededly competent master in a seaworthy vessel.

Imperial Oil Limited v. *Drlik*, 234 F. 2d 4 (6 C.A. 1954) c. d. 352 U. S. 941, is a parallel case. Unseaworthiness was claimed because no watchman was present at the operation in which plaintiff was injured. A watchman was available, but was not sta-

tioned where he should have been. This was held to be negligence only—the faulty judgment of the person in charge—and a finding of unseaworthiness was reversed. The final cause and not a more remote one controls.

POINT V

The Trial Court committed no error in limiting recovery to the value of the vessels involved in the accident.

(Answering Petitioner's Point III)

1.

The last event at the trial after the verdict and motions was the following between the Court, plaintiff's counsel and defendant's counsel:

> "The Court: * * * I will direct the clerk not to enter judgment until I decide the issue of limitation.
>
> All right, Gentlemen, thank you.
>
> On the issue of limitation there is a dispute as to the issue of value.
>
> Mr. Baker: Yes.
>
> The Court: With regard to that question we have to take testimony.
>
> Mr. White: Presumably only on the tug.
>
> Mr. Baker: On both, the tug and the barge, if we reach that question." (114a)

Plaintiff has been awarded the value of both the tug and the barge, all that he asked at the trial.

2.

The record is barren of any description of the operation in which plaintiff was injured except that the tug was going to "shift barges in the Weehawken terminal". There is no evidence whatever that any barge except the "Jones Point" or any other tug than No. 20 was involved. The operation as to which we have evidence involved only these two vessels and their value has been awarded plaintiff.

Plaintiff has progressed in not so easy stages from one tug and the one barge it was shifting, to all the barges the tug might shift with one crew, to all the tugs and all the barges the crew might work on in an unspecified time; to all the tugs and all the barges and all defendant's equipment in the harbor, to all the railroad. It is not clear where he would stop nor is there any logical stopping place—after the first, which the court enforced. Plaintiff would not leave defendant much solace in the limitation procedure which is still on the statute books. Possibly limitation is not in accord with the spirit of the age, possibly it should not be extended, but it must be allowed. The remedy must be allowed to some degree where it refers to something definite and readily ascertainable and not a standard of only "the facts of economic life", (Pet. 25) as to which parties may reasonably differ. The Court below applies a proper standard of definite time, definite place and limited operation. In *United States Dredging* (Pet. 22) a single operation limited as to time and place—dredging and gravel removal in Huntington Harbor—was involved. There was no reference to or liability

by reason of other operations of petitioner or any continuous service rendered by it not involved in a specific definite contract. Here we have no proof of any specific contract.

The decision below is entirely in accord with *Sacramento Nav. Co.* v. *Salz*, 273 U.S. 326 (1927) (Pet. 21). That case required surrender of the "combined means"—the tug and the barge it towed at the time of the accident. Precisely this was awarded plaintiff here.

The proper rule was indicated in *The George W. Pratt*, 76 F.2d 902, at 903 (2d C.A. 1935), where the Court stated:

> "Neither the actual decision nor the language of the Kristiansen case can be given so broad a scope as to mean that all the vessels used successively in performing a contract are to be deemed collectively one vessel for purposes of surrender in limitation of liability: *On the contrary*, we think the rule is established that the vessels to be surrendered are those devoted to performance of the contract of the particular time when the fault which causes the loss is committed." (Emphasis supplied)

No case, of course, makes the standard involved that of a contract of employment as petitioner would have it (Pet. 21-22). Each authority he recites relates the vessels involved to the contract the vessels are to perform, not their crew's contract with their employers.

Plaintiff asserts (Pet. 27) that the activities of the vessels here involved are not a voyage in the tradi-

tional sense—and therefore would measure liability by at least all the marine activities of the defendant. These activities are varied and continuous. They have no beginning and no end that can be certainly found. The cases cover situations that do have a fixed beginning and a fixed end—like the dredging in *United States Dredging Corporation*. Here there is none that can be fixed except the single operation of shifting from one pier to another.

3.

This point involves only well settled rules, not contested below. There was and is no issue except the application of such rules, to particular, very special facts.

POINT VI

No constitutional right of plaintiff has been violated.

(Answering Appellant's Point VII)

1.

The Trial Court pointed out that plaintiff was too late in asserting the alleged constitutional issue for the first time after trial and after decision on limitation (120a, 122a). We are given no excuse now for this delay.

2.

Limitation is a part, hoary with age and accumulated tradition, of the system of federal regulation of

matters maritime. This system the Congress may constitutionally add to or alter as it did with the Jones Act on which plaintiff sues, *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 378 (1924) and which statute has been held not to be in conflict with limitation of liability in *In re East River Towing Co.*, 266 U. S. 355. Another part of the system is the seaman's right to maintenance and cure which he has secured in this case.

Plaintiff (Pet. 44) calls this system "Russian Roulette". The same criticism must apply equally to any system which replaces a jury verdict with some other method of indemnity. Workman's Compensation laws restrict the recovery against an employee to a greatly reduced scale. The railroad land employee has greater rights against his employer under the Employers Liability Act than against another railroad where he might be a passenger or licensee. The Constitution requires only some reasonable classification and this is present—the employee relationship. The maritime employee may have his recovery reduced or extinguished through limitation; he has it increased or extended through maintenance and cure. There is an entire system with advantages and disadvantages, enacted in response to differing legislative considerations. Plaintiff is quite willing to accept those parts of the system which gives him a right and a remedy unknown in other systems—maintenance and cure—and relaxed requirements to establish liability—the Jones Act. He has in this litigation taken advantage of both of these advantageous features of the system. He cannot have these and claim the whole system unreasonable and arbitrary because one part—limitation—is to his disadvantage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.,
May 7, 1961.

Respectfully submitted,

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